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In The Supreme Court of the United States

MARIA GENOVEVA ANAYA, MARIO ANAYA, EDUARDO ANAYA, JESSICA ANAYA and AYDHEE ANAYA,

Petitioners,

v.

TRAYLOR BROS., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fifth Circuit in *Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251 (5th Cir. 2007), incorrectly held that Humberto Anaya – a laborer killed while working on the construction of a new bridge connecting the Texas mainland with Galveston Island – was not within the "twilight zone" of concurrent state and federal workers' compensation coverage recognized with respect to a bridge worker under virtually identical circumstances in *Davis v. Department of Labor*, 317 U.S. 249 (1942)?

Whether the Fifth Circuit incorrectly held that Texas Labor Code § 406.091, which provides that the TWCA excludes "a person covered by a method of compensation established under federal law," precluded Petitioners from electing between state and federal workers' compensation schemes in the "twilight zone" of concurrent coverage, although a similar statute in *Davis* had no such effect?

Whether the Fifth Circuit's expansion of exclusive federal workers' compensation jurisdiction to encompass workers previously within the "twilight zone" of concurrent state and federal coverage violated principles of federalism?

PARTIES TO THE PROCEEDING

Petitioners are Maria Genoveva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya. Respondent is Traylor Brothers, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Maria Genoveva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya respectfully petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 10, 2007, in order to resolve a conflict between this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942), and the Fifth Circuit Court of Appeals opinion in this case. The Fifth Circuit's opinion and judgment are squarely contrary to this Court's "twilight zone" jurisprudence under *Davis* and its progeny, and the Court should reverse the Fifth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated January 10, 2007, is published at 478 F.3d 251. The order and opinion of District Judge Samuel B. Kent, United States District Court for the Southern District of Texas, Galveston Division, dated October 14, 2005, is unpublished and is available on Westlaw at 2005 WL 2621549.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 10, 2007. A Motion for Reconsideration and Petition for Panel Rehearing was timely filed, and was denied on February 7, 2007. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90

days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Circuit relied on Texas Labor Code § 406.091, part of the Texas Workers Compensation Act, which provides in relevant part: "(a) The following employees are not subject to this subtitle: . . . (2) a person covered by a method of compensation established under federal law." TEX. LABOR CODE ANN. § 406.091 (Vernon Supp. 2006).

STATEMENT

Petitioners are beneficiaries of Humberto Anaya, who was killed by a falling concrete form while working on the construction of a new bridge connecting the Texas mainland with Galveston Island. (App. 2a). At the time of his death, Anaya was an employee of Respondent, Traylor Brothers, Inc. Anaya's work for Respondent was fairly routine construction work, which did not involve any activities normally associated with maritime functions or industries. During an undetermined portion of Anaya's work day, he was required to stand on a barge beneath the bridge-in-progress. (App. 5a-6a).

Petitioners filed a claim for benefits under the Texas Workers Compensation Act (TWCA), and initial payments and notices indicated that the benefits were being processed under the TWCA.[1] However, after the Petitioners advised

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[1]Respondent represented to the courts below that Petitioners sought and/or accepted benefits under the LHWCA. Although Petitioners submit that the

Respondent of their intent to file suit seeking exemplary damages as permitted under the TWCA, Respondents' counsel contended that Petitioners were being compensated under the Longshore and Harbor Workers' Compensation Act (LHWCA), which prohibits exemplary damages. After Petitioners filed their lawsuit against Respondent, Respondent's workers' compensation carrier sent Petitioners a notice that benefits were being paid under the LHWCA. Respondent then moved for summary judgment on Petitioners' claims on the grounds that the LHWCA exclusively governed the claims and did not allow the relief Petitioners sought. The district court granted Respondent's motion. 2005 WL 2621549. The Fifth Circuit Court of Appeals affirmed in *Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251 (5th Cir. 2007), entered Jan. 10, 2007.

The district court had diversity jurisdiction over this case under 28 U.S.C. § 1332 because Petitioners reside in Texas, while Respondent Traylor Brothers, Inc., is a corporation with its principal place of business in the state of Indiana.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the questions raised herein concern the administration of the LHWCA[2] and implicate important questions of federalism. First, the Fifth

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record conclusively contradicts this contention, resolution of the issues raised in this petition does not turn on whether Petitioners' benefits were sought or processed under the LHWCA.

[2] *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 116 (1962), and *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 528 (1956) (granting certiorari due to importance of questions involving administration of the LHWCA).

Circuit Court of Appeals' opinion is directly contrary to this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942), which established a "twilight zone" of concurrent state and federal workers' compensation jurisdiction.

Second, by refusing to follow *Davis*, the Fifth Circuit extended exclusive federal workers' compensation jurisdiction into an area that has been concurrently occupied by state and federal workers' compensation schemes for over 60 years, usurping Texas' power to regulate workers' compensation within the "twilight zone" of concurrent jurisdiction.

Third, in declining to analyze this case under the controlling law, the Fifth Circuit substantially departed from existing jurisprudence, and issued a published opinion that provides faulty guidance for federal and state courts in Texas and other jurisdictions.

Fourth, the Fifth Circuit's error deprived Anaya's spouse and heirs of their right under Texas law to seek exemplary damages from Respondent.

A. The Fifth Circuit Court of Appeals' Decision is in Conflict with This Court's Decision in *Davis*.

Anaya is in precisely the same position as the worker who fell within a "twilight zone" of concurrent jurisdiction between the LHWCA and the state compensation scheme in *Davis v. Department of Labor*, 317 U.S. 249 (1942). *Davis* involved a steelworker who fell from a barge and died while helping to dismantle a bridge over a navigable river. *Id.* at 251-52. Because the steelworker was on the borderline between land-based and marine-based activity, this Court held that such workers "occupy that shadowy area within which, at some

undefined and undefinable point, state laws can validly provide compensation." *Id.* at 253. The Court recognized this "shadowy area" as a "twilight zone in which employees must have their rights determined case by case." *Id.* at 256. *Davis* thus established this Court's long-standing "twilight zone" jurisprudence, permitting workers in this zone of concurrent state and federal workers' compensation coverage to elect coverage under either compensation scheme.

The facts of *Davis* involved a bridge worker injured on a floating platform over navigable waters. As the Fifth Circuit's fact recitation shows, the present case involves precisely the same situation:

> Humberto Anaya worked for Traylor as a carpenter on the Texas Department of Transportation Causeway project. At the time of his fatal accident, Anaya was constructing a bridge that connected Interstate 45 from Galveston Island to the mainland. On October 15,2004, while Anaya drilled bolt holes, a form collapsed and crushed him underneath a concrete beam . . . . Anaya performed his construction duties on a barge located on navigable waters . . . .

478 F.3d at 253 (App. 2a). Thus, *Davis* was factually on point in this case. Nevertheless, the Fifth Circuit did not follow *Davis*. Instead, the Fifth Circuit stated: "[w]e . . . reject the Anayas' argument that Anaya was in a twilight zone . . . . An employee subject to Anaya's work conditions on navigable waters may only recover under the LHWCA." *Id.* at 255 (App. 6a-7a).

There is no valid legal ground for the Fifth Circuit's refusal to follow *Davis*. First, *Davis* is still controlling law. This Court has continuously recognized and upheld *Davis*, notably in its major "twilight zone" decisions of *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), and *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983). In *Calbeck*, this Court acknowledged the continuing validity of overlapping coverage, holding that the LHWCA was intended to reach workers on navigable waters "*whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.*" *Id.* at 125-27 (emphasis added). In *Sun Ship*, this Court acknowledged that neither its prior decision in *Calbeck* nor the 1972 Amendments to the LHWCA affected the continuing vitality of its decision in *Davis*. *See Sun Ship*, 447 U.S. at 717-19 (noting that *Calbeck* did not overturn *Davis* but "further overlapped federal and state-law coverage for marine workers"); *id.* at 722 ("We . . . find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction would coexist with state compensation laws. . . .").

In *Perini*, this Court noted that injuries within the former "maritime but local" sphere[3] are now "compensable under *either state or federal law*." 459 U.S. at 309 n.19 (emphasis added). This Court further observed in *Perini* that, with the

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[3] The former "maritime but local" sphere encompassed activities where "the employment of an injured worker was determined to have no 'direct relation' to navigation or commerce, and 'the operation of local law [would not] materially affect' the uniformity of maritime law." *Perini*, 459 U.S. at 306.

1972 Amendments, Congress specifically contemplated that the extension of LHWCA coverage would overlap with state coverage. *Id.* at 311 n.21 ("*Calbeck* made clear that 'Congress brought under the coverage of the Act all such injuries [suffered by employees working on the navigable waters] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.'") (bracketed material in original). These cases confirm that *Davis* is still good law and that Congress's 1972 Amendments to the LHWCA did not affect the continuing viability of *Davis*.[4]

Second, the Fifth Circuit conducted no inquiry to determine whether Anaya was within the "twilight zone" of concurrent coverage. This determination requires close review of the "particular facts." *See Davis*, 317 U.S. at 255 ("[T]he line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."). Under a proper "twilight zone" analysis, the first step should have been to inquire whether the Texas Workers Compensation Act might apply to a worker in Anaya's circumstances. Indeed, the TWCA has no territorial limitation, and expressly provides for extraterritorial coverage in some circumstances. TEX. LABOR CODE ANN. § 406.071 (Vernon Supp. 2006). Therefore,

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[4]Lower courts seated in Texas have applied the "twilight zone" jurisprudence. *See Roy v. Bethlehem Steel Corp.*, 838 F. Supp. 312 (E.D. Tex. 1993) (where boilermaker died working on a drilling vessel berthed on land in a shipyard, there was overlapping state and federal "twilight zone" coverage); *Frias v. Atlantic Richfield Co.*, 999 S.W.2d 97 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (even if defendants properly raised argument that the LHWCA preempted the TWCA, the decedent fell within the "twilight zone" of jurisdiction so his beneficiaries could elect to proceed under either statutory scheme).

putting aside the question of LHWCA applicability or Texas Labor Code § 406.091, the TWCA would indisputably apply to Mr. Anaya's activities as a Texas resident employed in Texas to do carpentry work on a bridge connecting two Texas land masses (the Texas mainland and Galveston Island).

The next step of a proper "twilight zone" analysis would be to inquire whether the LHWCA might also apply. Although, in the district court and Court of Appeals, Petitioners questioned the applicability of the LHWCA to a land-based worker standing on a barge to help build a bridge, it appears from this Court's opinion in *Perini* that Anaya was working over "navigable waters" and that this would make him a maritime employee covered by the LHWCA under existing law. Thus, if the Fifth Circuit had conducted a proper "twilight zone" analysis, it could only have concluded that there was concurrent coverage here.

Third, the Fifth Circuit cited no grounds for departing from *Davis* – and, indeed, failed to analyze or discuss *Davis* at all except to mention the case in passing while referring to Petitioners' contentions. Instead, the Fifth Circuit cited two specific bases for its conclusion that Anaya was not in the "twilight zone." Neither basis comports with this Court's prior jurisprudence or supports the Fifth Circuit's refusal to accord Anaya "twilight zone" status. First, the Fifth Circuit cited *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959), for the proposition that an employee could not elect a remedy "if the case were not within the 'twilight zone,' for then the Longshoreman's Act would provide the exclusive remedy." 478 F.3d at 255 (App. 6a). But the quoted selection from *Hahn* does not support a conclusion that Anaya was not in the "twilight zone." Rather, it merely identifies the legal effect

after a court determines that a worker is not in the twilight zone. Second, the Fifth Circuit stated that it "agree[d] with the Commission's analysis and interpretation of the federal and state compensation schemes as applied in this instance." 478 F.3d at 255 (App. 6a). But the Commission did not address the "twilight zone" argument, which had not been raised before the Commission.

The Fifth Circuit also appeared either (a) to conclude that its inquiry ended when it found that Anaya was covered by the LHWCA, or (b) to conclude that its interpretation of Texas Labor Code § 406.091 to preclude coverage under the TWCA made a "twilight zone" analysis unnecessary. The first conclusion is contrary to *Perini*, where this Court made clear that a determination that one compensatory scheme is applicable does not mean that such scheme is *exclusively* applicable, nor does it mean that the other scheme is inapplicable. *See* 459 U.S. at 311 n. 21 (rejecting suggestion that if employee could be covered by a state compensation remedy, it would be consistent with *Calbeck* to deny LHWCA coverage); *id.* at 314 (noting that in 1972 Congress removed language stating that "federal compensation would be available only if recovery 'may not validly be provided by state law.'"). The second conclusion is contrary to *Davis*, where, as discussed in the following section, this Court held that a "twilight zone" of state and federal jurisdiction existed despite the existence of state and federal provisions comparable to Texas Labor Code § 406.091.

For these reasons, there was no valid basis for the Fifth Circuit's refusal to conclude that Anaya was within the "twilight zone" of concurrent state and federal workers' compensation coverage recognized in *Davis*.

B. The Fifth Circuit Incorrectly Interpreted Texas Labor Code § 406.091 to Preclude Petitioners From Electing Between Concurrently Applicable State and Federal Compensation Schemes, Because *Davis* Establishes That a Statute Like Section 406.091 Does Not Preclude Concurrent "Twilight Zone" Coverage

The Fifth Circuit relied on Texas Labor Code § 406.091(a)(2) in concluding that "an election of benefits was not available for the Anayas." 478 F.3d at 255 (App. 6a-7a). Section 406.091(a)(2) provides that the Texas workers' compensation scheme does not apply to "a person covered by a method of compensation established under federal law." TEX. LABOR CODE ANN. § 406.091(a)(2) (Vernon 2006). The Fifth Circuit's conclusion was incorrect and contrary to *Davis*.

In *Davis*, this Court recognized a "twilight zone" of concurrent state and federal workers' compensation coverage despite the existence of a Washington statute which – like Texas Labor Code § 406.091 – provided that the state workers' compensation act applied "to all employers and workmen . . . engaged in maritime occupations *for whom no right or obligation exists under the maritime laws.*" 317 U.S. at 252 (emphasis added). The Washington statute at issue in *Davis* is functionally indistinguishable from Texas Labor Code § 406.091(a). Both statutes specify that the state workers' compensation scheme applies only where federal laws do not provide coverage. Despite such a statute, this Court found concurrent "twilight zone" coverage in *Davis*.

Moreover, the Court in *Davis* was also faced with a *federal* provision in the LHWCA that contained language similar to Texas Labor Code § 406.091(a)(2). As noted in

Perini, Section 903 of the LHWCA at the time of *Davis* stated that the federal compensation law would apply only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." *See Davis*, 317 U.S. at 260 (Stone, C.J., dissenting) (citing former § 903); *Perini*, 459 U.S. at 314.

Although the Court in *Davis* did not extensively analyze the effect of either of these provisions, there was no suggestion that these provisions precluded the Court from analyzing or finding concurrent state and federal jurisdiction within the "twilight zone." To the contrary, the Court appeared to act on the assumption that Section 903 – and the comparable Washington provision – were merely intended to prevent the federal and state schemes from encroaching on each other:

> The Longshoremen's Act . . . provided a partial solution [to the confusion about applicability of state and federal compensation schemes]. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other.

317 U.S. at 255.[5]

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[5]In *Parker v. Motor Boat Sales*, 314 U.S. 244, 248-50 (1941), this Court held that Section 903 was to be read consistently with the purpose of the Act to "provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states," and that the field in which a state may not validly provide for compensation is "the same field which the Jensen line of decision excluded from state compensation laws." Based on *Motor Boat Sales*, the dissent in *Davis* argued that the LHWCA "left no room for an overlapping dual system," and asserted that

The Court in *Davis* also concluded that the LHWCA's own exclusivity provision was not relevant in determining whether a worker falls within the "twilight zone" of concurrent coverage. That provision, Section 905, provided – and still provides – that the employer's liability under the LHWCA is "exclusive and in the place of all other liability of such employer to the employee." *Davis*, 317 U.S. at 252-53, 256; 33 U.S.C. § 905. The Court stated that this federal exclusivity provision "gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line and is no assistance in discovering on which side he can properly be placed." *Id.* at 256. In other words, the effect of a statutory provision in one of the competing compensatory schemes cannot be used – as the Fifth Circuit evidently used Texas Labor Code § 406.091 here – to decide which side of the state-federal "divide" a worker sits on, and thus to remove the worker from the "twilight zone" of concurrent jurisdiction.

Because the Court in *Davis* ruled that the decedent fell within a "twilight zone" of overlapping jurisdiction despite a Washington statute and a federal provision similar to Texas Labor Code § 406.091, and because the Fifth Circuit failed to identify any legal or factual distinction that would justify departing from *Davis*, the Fifth Circuit erred in concluding that

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"in any case in which compensation might have been awarded under the federal act, a recovery under state law is in plain derogation of the federal statute [Section 903], as construed in the *Motor Boat* case." *Davis*, 317 U.S. at 261. This Court rejected that view in *Davis*, holding that the Washington state compensation system could constitutionally reach into an area also covered by the LHWCA. The Court therefore recognized that dual "twilight zone" coverage exists notwithstanding state and federal statutes stating that their coverage ends where the other system begins.

Texas Labor Code § 406.091 precluded Petitioners from electing coverage under the TWCA.

Before deciding to disregard *Davis* and find that a statute like Section 406.091 precludes a worker in the "twilight zone" from electing state workers compensation coverage, the Fifth Circuit should have conducted an analysis to determine how a Texas court would interpret Texas Labor Code Section 406.091. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 179 (1940). The Fifth Circuit conducted no such analysis, but if it had, it could not reasonably have concluded that Texas Labor Code Section 406.091 was intended to preclude a worker in the "twilight zone" of federal and state workers' compensation coverage from electing state coverage. There is no Texas case law or legislative history that supports the Fifth Circuit's reading of the statute.

The only reasonable interpretation of Section 406.091 is that it is designed to prevent double recoveries and to ensure that neither compensation scheme encroaches on the other. This is the interpretation that the courts of Washington have placed on the similar statute at issue in *Davis*. *See Gorman v. Garlock, Inc.*, 118 P.3d 311, 208 (Wash. 2005) ("[T]he WIIA exempts from its coverage Washington workers covered by certain federal workers' compensation statutes, including the LHWCA . . . . The legislature's intent in excluding LHWCA-covered workers from the WIIA was to prevent double recovery by [such a] worker")." Moreover, as noted, this Court suggested that the LHWCA and the Washington workers' compensation scheme – both of which contained a provision comparable to Section 406.091 – were designed to ensure that

the federal and state schemes did not "encroach on the field occupied by the other." *Davis*, 317 U.S. at 252-53, 255-56.

There is also Texas case law confirming that the purpose of a statute of this type is to prevent double recovery. In *Nixson v. Mobil Oil Corp.*, 928 S.W.2d 245 (Tex. App.—Houston [14 Dist.] 1996, no pet.), an injured railway employee received benefits under the TWCA, then sued the employer for damages under the Texas Railroad Liability Act. The employer contended that the TWCA's "exclusive remedy" provision prevented the employee from recovering under the TLRA, and the employee responded that the TLRA prohibits any statute from limiting liability under the TLRA. *Id.* at 249. The court in *Nixson* noted that, before 1989, the TWCA *excluded* coverage of railway employees due to "'the fact that the operation of such transportation system was subject to the Railway Liability Act.'" *Id.* (citing *Houston Transit Co. v. Farrack*, 403 S.W.2d 184, 190 (Tex. Civ. App.—Houston 1966, no writ)). The court stated that the Legislature's prior exclusion of railway workers expressed an intent not to allow railroad workers to benefit under two recovery schemes. *Id.* Even though the exclusion was no longer in the statute, the court held that the legislative intent of preventing double recovery precluded the employee from recovering under both statutes, requiring him to make an election. *Id.*

It is also appropriate, in analyzing the Texas Legislature's purpose in enacting Texas Labor Code § 406.091, to consider Texas' policy in enacting workers' compensation laws. *See Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1151 (1st Cir.1996). The Texas Supreme Court has instructed that the TWCA should be "liberally construed to award the injured employee the greatest benefits the nature of

his injuries warrant," construing any doubt in favor of compensation. *Jones v. Liberty Mut. Ins. Co.*, 745 S.W.2d 901, 902-03 (Tex. 1988). In light of the foregoing case law from Texas, as well as this Court's and the Washington Supreme Court's construction of the similar Washington statute, there is no valid basis for the Fifth Circuit's assumption that Texas Labor Code § 406.091 was intended to slam the door on the "twilight zone."

For the foregoing reasons, there was no basis for the Fifth Circuit's interpretation of Texas Labor Code § 406.091 to depart from *Davis* and reject the existence of a "twilight zone" of concurrent coverage.

C. From a Federalism Standpoint, the Fifth Circuit's Refusal to Apply *Davis* Unnecessarily Expands Federal Scope into the "State" Part of the Shared State-Federal "Twilight Zone."

This Court held in *Davis* that a state may constitutionally apply its workers' compensation laws to a worker in a "twilight zone" between state jurisdiction and maritime jurisdiction. 317 U.S. at 253, 256. By incorrectly interpreting Texas Labor Code § 406.091 to disclaim any state jurisdiction in "twilight zone" situations, the Fifth Circuit has expanded exclusive federal jurisdiction to "occupy" an area previously shared by state and federal workers' compensation laws. The Fifth Circuit has thereby negated and supplanted the existing concurrent state jurisdiction in violation of principles of federalism.

Workers' compensation laws operate in a traditionally local arena. *Cf. Carroll v. Lanza*, 349 U.S. 408, 412-13 (1955). Texas has an interest in applying its workers' compensation

laws to people who work, reside or are injured in Texas. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 278 (1980); *see also Sabine Consol., Inc. v. State*, 806 S.W.2d 553, 559 (Tex. Crim. App. 1991). The federal government has never sought to encroach on this arena by enacting a nationwide workers' compensation system; instead, with some exceptions, such as the offshore or maritime coverage afforded by LHWCA, legislation in this area has generally been left to the states. *See Ceres Terminals, Inc. v. Industrial Com'n of Illinois*, 53 F.3d 183, 185-86 (7th Cir. 1995) ("Congress has not 'occupied' the field of workers' compensation for maritime employees; to the contrary, it has tried to authorize states to expand their role."); *see also Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 249 (1941) (noting that "[t]here can be no doubt that the purpose of the [LHWCA] was to provide for federal compensation in the area which [prior U.S. Supreme Court decisions] . . . placed beyond the reach of the states.").

Texas also has expressed a specific interest, both in its Constitution and in the Texas Labor Code, in permitting workers to sue for exemplary damages when their injuries are caused by an employer's gross negligence. Texas Labor Code § 408.001(b) provides that the TWCA's "exclusive remedy" provision "does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence." TEX. LABOR CODE ANN. § 408.001(b) (Vernon Supp. 2006). This provision reflects the requirement, embodied in the Texas Constitution, that "[e]very person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary

damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide." TEX. CONST. art. 16, § 26. *See also Garibay v. Decker*, 331 F. Supp. 1093, 1094 (S.D. Tex. 1971) (noting that the exemplary damages exemption from the "exclusive sweep" of Texas' Workers' Compensation law "is specifically mandated by the State's Constitution and its compensation statute."). Further, Texas' interest in having its policy choice honored on the availability of exemplary damages in workers' compensation death cases is substantial. *Cf. Carroll v. Lanza*, 349 U.S. 408, 412-13 (1955) (interests of Arkansas in permitting injured employees to sue third parties in negligence, rather than making workers' compensation the exclusive remedy, were "large and considerable").

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court held that any extension of federal power into areas traditionally regulated by states is an "extraordinary power" which Congress "does not exercise lightly." *Id.* at 460. Therefore, this Court held that federal legislation will not be interpreted to intrude on areas of traditional state regulation unless Congress makes a "plain statement" indicating such intent. *Id.* at 460-61 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

There is no "plain statement" in the LHWCA to suggest that Congress intended to supplant an area of traditional state regulation – state workers' compensation laws — with respect to workers in the "twilight zone" of overlapping state and federal jurisdiction. Nor is there any basis for the Fifth Circuit to interpret Texas Labor Code § 406.091 to achieve such a result contrary to *Davis*. The Fifth Circuit therefore erred in

construing Texas Labor Code § 406.091 to disclaim state workers' compensation jurisdiction over workers in the "twilight zone" of overlapping federal and state jurisdiction, and in thereby expanding federal jurisdiction to exclusively "occupy" a recognized zone of concurrent state and federal jurisdiction.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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In The Supreme Court of the United States

MARIA GENOVEVA ANAYA, MARIO ANAYA, EDUARDO ANAYA, JESSICA ANAYA and AYDHEE ANAYA,

Petitioners,

v.

TRAYLOR BROS., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41872

MARIA GENOVEVA ANAYA, MARIO ANAYA,
EDUARDO ANAYA, JESSICA ANAYA,
AYDHEE ANAYA,
Plaintiffs-Appellants,

versus

TRAYLOR BROTHERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, STEWART, and CLEMENT, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Humberto Anaya, an employee of Traylor Bros., Inc. ("Traylor"), suffered fatal injuries on a barge while constructing a bridge. Soon thereafter, Traylor's insurer began paying compensation benefits to his beneficiaries (the

"Anayas"). Approximately two months later, the Anayas filed suit against Traylor for exemplary damages. The district court granted Traylor's motion for summary judgment. The court concluded that Traylor's insurer paid the compensation benefits under the Longshoremen and Harbor Workers' Compensation Act (the "LHWCA"), which precludes the recovery of exemplary damages. In this appeal, the Anayas argue that Traylor's insurer was actually paying benefits pursuant to the Texas Workers' Compensation Act (the "TWCA"). We affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Humberto Anaya worked for Traylor as a carpenter on the Texas Department of Transportation Galveston Causeway project. At the time of his fatal accident, Anaya was constructing a bridge that connected Interstate 45 from Galveston Island to the mainland. On October 15, 2004, while Anaya drilled bolt holes, a form collapsed and crushed him underneath a concrete beam. Anaya died the same day. On October 18, 2004, the Anayas submitted an application to the Texas Workers' Compensation Commission (the "Commission") for survivor benefits. The Anayas subsequently received a series of benefit checks from Traylor's insurer. On November 16, 2004, the Anayas' attorney sent a notice of representation to the insurer. In response, Traylor's insurer informed the Anayas that the benefits were paid pursuant to the Longshoremen and Harbor Workers' Compensation Act, not the Texas Workers' Compensation Act.

On December 27, 2004, the Anayas filed a request to receive TWCA benefits. Two days later, the Anayas filed suit against Traylor for exemplary damages based on Traylor's alleged gross negligence. In February 2005, Traylor's insurer filed a dispute with the Commission to establish whether the Anayas were entitled to benefits under the state or federal compensation scheme. On August 25, 2005, the Commission found in favor of the insurer, ruling that the Anayas did not qualify for TWCA benefits. Traylor then moved for summary judgment in the ongoing litigation because the LHWCA bars gross negligence claims for exemplary damages. The district court granted summary judgment to Traylor, reasoning that the LHWCA applied due to Anaya's work on navigable waters.

STANDARD OF REVIEW

This court reviews de novo a district court's grant of summary judgment, applying the same legal standards as the district court. *Machinchick v. P.B. Power, Inc.*, 398 F.3d 345, 349 (5th Cir. 2005). If no genuine issue of material fact exists, then the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view all evidence in the light most favorable to the non-movant. *Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003). If the evidence would permit a reasonable trier of fact to find for the non-moving party, then summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

DISCUSSION

A.

Under the TWCA, an injured worker's beneficiaries may file suit for exemplary damages, TEX. LAB. CODE ANN. § 408.001(b), but the LHWCA prohibits the recovery of exemplary damages, 33 U.S.C. §§ 904, 905(a). To receive benefits under the LHWCA, a worker must satisfy both a situs and status test. *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 (5th Cir. 1993). The situs test concerns geographic areas covered by the LWHCA, whereas the status test concerns an employee's type of work activities. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 78 (1979). The situs test includes injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999) (citing 33 U.S.C. § 903(a)). The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." *Id.* (quoting 33 U.S.C. § 902(3)). In addition,

> a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient or fortuitous. The presence, however, of a worker injured on the

> water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous.

Bienvenu, 164 F.3d at 908 (footnote omitted).

At the time of his accident, Anaya was undoubtedly located on navigable waters, which satisfies the situs test. In this appeal, the status test determines whether the LHWCA applies to the Anayas request for benefits. Neither this Circuit nor the Supreme Court provide a definitive explanation of what constitutes a transient and fortuitous presence on navigable water. *Id.*; *see also Director v. Perini N. River Assocs.*, 459 U.S. 297, 324 n.34 (1983). In *Bienvenu*, the Fifth Circuit sitting en banc contrasted the holdings of *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991), and *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *as modified by* 22 F.3d 568. The en banc court affirmed *Fontenot*, which held that "a worker who spent 40% of his worktime on shore, 30% on fixed platforms and 30% on oil exploration and production vessels was engaged in maritime employment because he was injured while on actual navigable waters, in the course of his employment." *Bienvenu*, 164 F.3d at 908-09 (citing *Fontenot*, 923 F.2d at 1130). Yet, the court overruled *Randall*, which held that the LHWCA covered a mechanic performing all of his work duties on navigable waters because "[h]e was simply transported to and from his workstation-a stationary platform-by boat." *Id.*

Unlike the worker in *Randall*, and more similar to the analysis in *Fontenot*, Anaya spent the majority of his time working on navigable waters. Anaya performed his construction duties on a barge located on navigable waters, and

a boat carried Anaya between the shore and his work site. The district court found that Anaya regularly worked on the barge and his October 15 work assignment was not an aberration from his normal work tasks. Therefore, the LHWCA covers the Anayas' claim for benefits.

B.

Section 406.091(a)(2) of the TWCA prohibits benefits to workers covered by analogous federal laws. The TWCA reads in pertinent part that "a person covered by a method of compensation established under federal law" is not subject to the statute. TEX. LAB. CODE ANN. § 406.091(a)(2). The Anayas argue that a twilight zone of concurrent jurisdiction, established by the Supreme Court's holdings in *Davis v. Dep't of Labor*, 317 U.S. 249 (1942), and *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), permits workers to elect benefits under either the TWCA or LHWCA. And pursuant to this allowance, they elected to receive benefits under the TWCA, thus preserving their right to file suit for exemplary damages. The Commission held that Anaya "is not entitled to all rights and remedies under" the TWCA and is limited to recovery under the LHWCA. We agree with the Commission's analysis and interpretation of the federal and state compensation schemes as applied in this instance, and therefore, reject the Anayas' argument that Anaya was in a twilight zone. *See Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959) (per curiam) ("[T]he employee could not [elect a remedy] if the case were not within the 'twilight zone,' for then the Longshoreman's Act would provide the exclusive remedy."). An employee subject to Anaya's work conditions on navigable waters may only recover under the

LHWCA. Accordingly, an election of benefits was not available for the Anayas.

CONCLUSION

Based on *Bienvenu* and the explicit language of the TWCA, we affirm the district court's grant of summary judgment to Traylor.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41872

MARIA GENOVEVA ANAYA, MARIO ANAYA,
EDUARDO ANAYA, JESSICA ANAYA,
AYDHEE ANAYA,
Plaintiffs-Appellants,

versus

TRAYLOR BROTHERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing is denied.

ENTERED FOR THE COURT:
Carl E. Stewart
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA GENOVEVA ANAYA, et al.	§	
Plaintiffs	§	
	§	CIV. ACTION
v.	§	NO. G-04-740
	§	
TRAYLOR BROS., INC.	§	
Defendant	§	

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

KENT, J.

This case arises out of fatal injuries suffered by Humberto Anaya ("Anaya") while working for Traylor Bros. Inc. ("Defendant") on the Galveston causeway. Now before the Court is Defendant's Motion for Summary Judgment. For the following reasons, Defendant's Motion is GRANTED, and Plaintiffs' claims are DISMISSED WITH PREJUDICE.

I. Background

Anaya was working as a carpenter on the Galveston causeway construction project where his workstation was generally on a floating barge in Galveston Bay. He was transferred to and from the barge by boat every day. On October 15, 2004, he was drilling bolts in a form that was allegedly inadequately secured. While he was working on the

form, a large beam fell, crushing Anaya and causing fatal injuries. The Anaya family ("Plaintiffs") filed for survivor benefits. Plaintiffs claim that they elected these benefits pursuant to the Texas Workers' Compensation Act ("TWCA"), and they filed this action to recover for gross negligence. Traylor's insurance carrier began sending payments to Plaintiffs, who regularly cashed the checks provided. Traylor claims that these payments were made pursuant to the Federal Longshore and Harbor Workers' Compensation Act ("LHWCA"). Defendant now moves for summary judgment arguing that the LHWCA precludes claims for gross negligence. The Court agrees with Defendant.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." FED. R. CIV. P. 56(e), *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The court must view all evidence in the light most favorable to the non-movant. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir.2003), *cert. denied*, 539 U.S. 915, 123 S. Ct. 2276, 156 L.Ed.2d 130 (2003). If the evidence would permit a reasonable fact finder to find in favor of the non-moving party, summary judgment should not

be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

III. Analysis

A. TWCA v. LHWCA

The Parties argue for application of two different statutory schemes to this case, the TWCA and the LHWCA. The operative difference between the two schemes is their treatment of exemplary damages for gross negligence. In short, the TWCA allows them, and the LHWCA does not. *See* TEX. LABOR CODE ANN. § 408.001 (Vernon Supp.2005); 33 U.S.C. §§ 904, 905(a). In other words, if the TWCA applies to this case, Plaintiffs can continue to pursue their claims. If the LHWCA applies, they cannot.

B. LHWCA Application

Plaintiffs argue that Anaya was not covered by the Act, or alternatively, that his work "falls within the 'maritime but local twilight' zone of overlapping federal and state compensation schemes," giving Plaintiffs the sole option of electing benefits under either statutory scheme. Defendant devotes no time to Plaintiffs' first argument, but focuses on the argument that there is no zone of overlapping federal and state compensation schemes in Texas, since the TWCA specifically excludes cases covered by federal compensation statutes.

In order to qualify for coverage under the LHWCA, "a worker must satisfy both a situs and a status test." *Munguia v. Chevron U.S.A. Inc.*, 999 F.2d 808, 810 (5th Cir.1993). The situs requirement is satisfied when the injury occurs "upon the navigable waters of the United States (including any adjoining

pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). There is no question that Anaya, who was on a barge in Galveston Bay, was "upon the navigable waters of the United States" when his injury occurred.

In this case, it is the status test that is outcome determinative. Plaintiffs assert that "certainly a carpenter engaged in highway road work is not included in the list of enumerated occupations within [the LHWCA's] scope." However, this argument ignores clear Fifth Circuit and Supreme Court precedent to the contrary. The status test is found in § 902(3), which defines eligible employees as those "engaged in maritime employment." 33 U.S.C. § 902(3). This status test was added to the LHWCA in the 1972 amendments to the Act which also expanded coverage to include certain areas adjoining navigable waters. *See Director v. Perini N. River Associates*, 459 U.S. 297, 305-306, 103 S. Ct. 634, 641, 74 L.Ed.2d 465 (1983). Prior to the 1972 amendments, any employee working on navigable waters, no matter his trade or task, would have been covered by the Act. *See id.* The purpose of the added status test "was to extend coverage to those injured in maritime employment on certain areas adjoining previously-covered sites but not actually on navigable waters. It thus became necessary to describe affirmatively the class of workers Congress desired to compensate." *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 811 (5th Cir.1993) (citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264, 97 S. Ct. 2348, 2357, 52 L.Ed.2d 320 (1977)). In post-amendment cases, the Supreme Court held that examination of Congressional intent mandated the limitation of the added status requirement to the land-based coverage that

was included in the 1972 amendments. *See Perini*, 459 U.S. at 317-18, 103 S. Ct. at 647-48; *Munguia*, 999 F.2d at 811.

These authorities leave a two part status test to determine eligibility under the Act. The first inquiry is whether the employee was working on navigable waters at the time of his injury. If he was, he is covered by the Act. If he was not, he only satisfies the status test if his employment "is directly connected to the commerce carried on or by the ship or vessel." *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1130 (5th Cir.1991). In this case, Anaya was working on navigable waters, so the second prong of the status test is moot. Anaya meets both the situs and status test and was an eligible employee under the Act.

C. TWCA Application

Since the Court finds that Anaya was an eligible employee under the LHWCA, it must consider Plaintiffs' alternative argument, that Anaya was working in a "twilight zone" of overlapping federal and state compensation schemes. Essentially, Plaintiffs argue that Anaya's injuries are covered by both the TWCA and the LHWCA, and Plaintiffs have the option to choose which scheme they would like to proceed under. This argument is based on the Supreme Court's decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980). In *Sun Ship*, the Court considered whether "a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the [LHWCA], as amended in 1972." Id. The Court held that it could. *Id.*

Sun Ship is inapplicable to this case for two reasons. First, *Sun Ship* was limited to cases covered by the 1972

amendments. This is not one of those cases. As discussed above, Anaya's injury would have been covered pre-1972.[6] Even more importantly, *Sun Ship* does not apply because it was decided in consideration of Pennsylvania law, which was markedly and operatively distinct from the TWCA. Namely, the Pennsylvania workers' compensation statute otherwise applied to the case before the Court. The TWCA does not even apply to Anaya's case, so there is no issue of overlapping statutory schemes. Section 406.091(a)(2) of the TWCA specifically excludes "a person covered by a method of compensation established under federal law." TEX. LABOR CODE ANN. § 406.091(a)(2) (Vernon 1996). As analyzed above, the LHWCA applies to Anaya's case. The LHWCA is a method of compensation established under federal law, so Anaya's injuries are not covered by the TWCA. Plaintiffs' alleged election of TWCA benefits is of no moment. Plaintiffs cannot elect to receive benefits to which they are not entitled. Plaintiffs' only means of compensation for the fatal injuries to Anaya is through the LHWCA.

IV. Conclusion

Since the LHWCA applies to this case, Plaintiffs cannot recover exemplary damages for gross negligence. Accordingly, Defendant's Motion for Summary Judgment is hereby GRANTED. All of Plaintiffs' claims asserted in this cause of action are DISMISSED WITH PREJUDICE. A Final Judgment will be issued contemporaneously with this Order. Each Party

---

[6]The Court is aware that there is other Supreme Court authority that would have been more applicable to this case. *See e.g., Davis v. Dept. of Labor*, 317 U.S. 249, 63 S. Ct. 225, 87 L.Ed. 246 (1942). However, since *Sun Ship* is inapplicable on other grounds, it is not necessary to analyze these other cases.

is to bear its own taxable costs, attorneys' fees, and expenses incurred herein to date.

IT IS SO ORDERED.

DONE this 14th day of October 2005, at Galveston, Texas.

Samuel B. Kent
United States District Judge

Supreme Court, U.S.
FILED
JUL 11 2007
OFFICE OF THE CLERK

No. 06-1489

IN THE

Supreme Court of the United States

MARIA GENOVEVA ANAYA, MARIO ANAYA, EDUARDO ANAYA, JESSICA ANAYA AND AYDHEE ANAYA,

Petitioners,

v.

TRAYLOR BROS., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's finding that Humberto Anaya - a laborer accidently killed while working on the construction of a new bridge connecting the Texas mainland with Galveston Island - was not within the "twilight zone" of concurrent state and federal workers' compensation coverage recognized with respect to a bridge worker?

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's finding that the Texas Labor Code § 406.091, which provides that the Texas Workers' Compensation Act excludes "a person covered by a method of compensation established under federal law," precluded Petitioners from electing between state and federal workers' compensation schemes?

III. Whether Petitioners have presented compelling reasons to grant the Petition, where Petitioners allege that the Fifth Circuit's Opinion, which affirms the District Court's finding that Humberto Anaya's injuries were under the exclusive jurisdiction of federal workers' compensation coverage, violated principles of federalism?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Traylor Bros., Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Traylor Bros., Inc. ("Traylor Bros.") respectfully submits that the Petition for Writ of Certiorari filed by Petitioners Maria Genoveva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya ("Petitioners") should be denied.

INTRODUCTION

Petitioners seek review of a January 10, 2007 Order from the Fifth Circuit Court of Appeals ("Fifth Circuit") affirming the United States District Court for the Southern District of Texas – Galveston Division's Order granting Respondent's Motion for Summary Judgment. The Fifth Circuit found that Mr. Humberto Anaya, the decedent whose injury is at issue in this matter, was not within the "twilight zone" of concurrent state and federal workers' compensation coverage. The Fifth Circuit affirmed the District Court's finding that the Longshore and Harbor Workers' Compensation Act ("LHWCA") covers the Petitioners' claim for benefits. Additionally, the Fifth Circuit found that Texas Labor Code § 406.091(a)(2) precludes Petitioners from choosing benefits under the Texas Workers' Compensation Act, ("TWCA") since they were eligible for benefits under the Federal LHWCA.

Petitioners have presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted ("Petition"). *See* Sup.Ct.R.10. Specifically, Petitioners failed to demonstrate that the Fifth Circuit's January 10, 2007 Opinion ("Opinion") is in conflict with this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942). Additionally,

the Fifth Circuit's Opinion does not extend exclusive federal workers' compensation jurisdiction thereby usurping Texas' power to regulate workers' compensation within the "twilight zone" of concurrent jurisdiction. Further, the Fifth Circuit did not depart in any way from existing precedent, and its Opinion does not muddy the already murky waters of Federal LHWCA jurisprudence. Finally, the Fifth Circuit's Opinion appropriately applies the LHWCA and TWCA, and therefore, the Petition should be denied.

STATEMENT OF THE CASE

Humberto Anaya, an employee of Traylor Bros., was working as a carpenter on the Galveston causeway construction project where his workstation was generally on a floating barge in Galveston Bay. (CR 339, 341, 354). He was transferred to and from the barge by boat everyday. (*Id.* at 339, 354). On October 15, 2004, while working on the "form" (a frame for concrete), a large beam fell onto Mr. Anaya causing fatal injuries. (*Id.* at 354).

Petitioners filed for survivor benefits. Traylor Bros.'s insurance company began sending payments to Petitioners, who received and accepted death/survivor benefits under the LHWCA. (CR 38, 44-45, 265). On November 16, 2004, Petitioners' trial counsel, forwarded Traylor Bros. a letter putting them on notice of their representation. (CR 343-44).

On November 22, 2004, Respondent's counsel forwarded correspondence to Petitioners' counsel indicating, among other things, that Petitioners had elected to accept benefits pursuant to the LHWCA and, therefore, their suit was barred by the exclusivity provision of the LHWCA. (CR 329, 11-12 (supp.)). Approximately one month later, on December

27, 2004, the Petitioners filed a request with the Texas Workers' Compensation Commission requesting a termination of their LHWCA benefits in favor of benefits under the TWCA. (CR 330, 340-41). The Petitioners subsequently filed their complaint on December 29, 2004, two days after requesting termination of benefits and approximately one month and one week after they were clearly made aware that the Petitioners were accepting benefits pursuant to the LHWCA. (CR 330). The Petitioners continued to receive and accept the benefits from that point forward, knowing the benefits were for LHWCA payments. (*Id.*).

After an appropriate time for discovery had passed, Traylor Bros. moved for summary judgment in the District Court asserting the Petitioners gross negligence claim for exemplary damages was barred by the exclusivity provision(s) of the LHWCA. (CR 38, 265). In response to Traylor Bros.'s motion, Petitioners argued that: (a) the LHWCA was inapplicable because Mr. Anaya's work on a bridge was not one of the enumerated "maritime" occupations in the LHWCA, and (b) even if Mr. Anaya's work was within the LHWCA, it fell within the "twilight zone" of concurrent jurisdiction that permits beneficiaries to elect benefits under either state or federal workers' compensation schemes. (CR 322-23).

On September 12, 2005, the Texas Workers' Compensation Commission issued a decision stating that Petitioners were not entitled to the rights and remedies under the TWCA. (CR 330, 342). The Commission looked to the TWCA, Texas Labor Code § 406.091(a)(2), and 903(a) of the LHWCA which provides for compensation for death or disability if the death or disability results from an injury

occurring on navigable waters of the United States. (CR 331, 338). The Commission reasoned that the decedent's regular job duties were performed and his death occurred on navigable waters. Furthermore, the Commission held that because his presence upon such waters was not merely fortuitous or transitory, it appeared that he was covered by a method of compensation established under federal law. (CR 331, 340-42). As such, he was not covered by the TWCA pursuant to Texas Labor Code § 406.091(a)(2). (CR 340-42).

On October 14, 2005, the District Court granted summary judgment for Traylor Bros. (CR 359). The District Court held that the LHWCA applied to Mr. Anaya because he met both the situs and status test and was an eligible employee under the Act. (CR 357). The court further held that Petitioners could not rely on a "twilight zone" of overlapping coverage, ruling that the TWCA contains a provision excluding coverage where the injured worker was "a person covered by a method of compensation established under federal law." (CR 356-57).

As a result of the district court's holding, on October 24, 2005, Petitioners filed a motion for new trial which the court denied on December 12, 2005. (CR 367, 401-02). Consequently, an appeal was filed by Petitioners on December 15, 2005. (CR 403, 406). The Fifth Circuit rendered its opinion affirming the District Court's order on January 10, 2007. *Anaya v. Traylor Bros., Inc.*, 478 F.3d 251 (5th Cir. 2007). The Fifth Circuit held that Mr. Anaya's injury fell within the auspices of the LHWCA because he spent the majority of his time performing construction duties on a barge located on navigable waters and his injury occurred while doing the same. *Id.* at 254. Furthermore, the Fifth Circuit

agreed with the Texas Workers' Compensation Commission's analysis and interpretation of the TWCA and LHWCA in that Mr. Anaya did not fall within the "twilight zone" of concurrent jurisdiction. Thus, his injuries were only compensable under the LHWCA. *Id.* at 255. The Fifth Circuit concluded its opinion by affirming the District Court's order based upon its previous decision in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999), which construed the LHWCA's status test, and the TWCA, which precludes compensation when a mode of federal compensation is available. *Id.*

REASONS FOR DENYING THE PETITION

A. The Fifth Circuit's Decision Below is Not in Conflict with this Court's Decision in *Davis*.

Petitioners argue that the Fifth Circuit failed to follow this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942), which established a "twilight zone" of concurrent state and federal workers' compensation jurisdiction. Specifically, Petitioners suggest that the Fifth Circuit ignored case law which recognizes overlapping coverage between the LHWCA and state workers' compensation laws.

Petitioners argue that Mr. Anaya was in the same position as the worker who fell within the "twilight zone" of concurrent workers' compensation coverage in *Davis*, and therefore, Mr. Anaya should be deemed within the "twilight zone." Although the injured workers in both cases share factual similarities, the legal analysis and conclusion regarding both are quite different. The Supreme Court in *Davis* held that the worker fell within a "twilight zone" of

concurrent jurisdiction between the LHWCA and Washington's state compensation scheme. *Id.* at 256. In *Davis*, the Court looked to the Washington state compensation laws to determine whether state compensation could be awarded to a structural steelworker who died while dismantling a bridge over navigable water of the United States. *Id.* at 251. The Court found that the Washington statute provides compensation for employees and their dependants, such as decedent, if its application can be made "within the legislative jurisdiction of the state." *Id.* at 251. The Washington state compensation laws also applied to "all employers and workmen . . . engaged in maritime occupations for whom no right or obligation exist under the maritime laws." *Id.* at 252. (citing Rem. Rev. Stat. Wash. §§ 7674, 7693a).

Unlike the Washington state compensation laws considered in *Davis*, Texas workers' compensation law does not allow for concurrent-overlapping jurisdiction since Texas specifically excludes state workers' compensation coverage for workers covered by a federal compensation scheme. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). Therefore, no "twilight zone" of concurrent jurisdiction as described in *Davis* could exist because Texas state law specifically excludes dual coverage.

Respondent agrees with Petitioners that *Davis* and its progeny are still this Court's precedent with regard to LHWCA "twilight zone" jurisprudence. This "twilight zone" includes persons such as the decedent in the *Davis* case who are protected under a state compensation act and a federal compensation scheme. However, Petitioners refuse to acknowledge that Texas law (the TWCA) does not permit a "twilight zone" of concurrent jurisdiction because it does

not protect persons similarly situated. In Texas, if an employee is covered by a method of compensation established under federal law, then that employee is not permitted to receive benefits under the TWCA. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). The Texas statute could not be more clear. It does not allow for there to be overlapping-concurrent coverage between the TWCA and any federal workers' compensation scheme, including the LHWCA. Thus, the Fifth Circuit did not ignore this Court's "twilight zone" precedent, rather the court correctly applied a state statute which precludes overlapping maritime workers' compensation.

Petitioners also argue that the Fifth Circuit made no inquiry to determine whether Mr. Anaya was within the "twilight zone" of concurrent coverage, and thus further ignored *Davis*. Petitioners assert that a proper "twilight zone" determination includes an inquiry into whether both the LHWCA and the state's workers' compensation scheme apply to the facts of a case. This argument is misguided since the Fifth Circuit did conduct an analysis to determine whether there could be overlapping coverage.

The Fifth Circuit began its discussion of the case by determining whether Mr. Anaya's accidental death fell within the ambit of the LHWCA. *See Anaya*, 478 F.3d at 253-54. "To receive benefits under the LHWCA, a worker must satisfy both a situs and status test." *Id.* (*citing Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 (5th Cir. 1993). The Fifth Circuit reasoned that Mr. Anaya's accidental death was covered by the LHWCA because he spent a majority of his time working upon navigable waters and his accident took place on a barge located on navigable waters. *Id.* at 254. The court determined that Mr. Anaya performed a "not

insubstantial" amount of his work on navigable waters; therefore, his presence on navigable waters was neither transient nor fortuitous given the facts of the case. *Id.* at 254; *See Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999). Thus, the Fifth Circuit found the injury to be compensable under the LHWCA. Petitioners even acknowledge that the Fifth Circuit was correct in finding that Mr. Anaya was a maritime employee covered by the LHWCA.[1]

Contrary to Petitioners' contention, the Fifth Circuit did complete an inquiry into whether the TWCA covered Mr. Anaya's accidental death. After determining that Mr. Anaya was covered under the LHWCA, the court discussed § 406.091(a)(2) of the TWCA, which "prohibits benefits to workers covered by analogous federal laws." *Anaya*, 478 F.3d at 254-55. The court also considered the Texas Workers' Compensation Commission's finding that Mr. Anaya was not entitled to coverage or other remedies allowed under the TWCA because his coverage under the LHWCA precluded any overlapping coverage. *Id.* at 255; (CR 336-42).

In footnote 4 of the Petition for Writ of Certiorari, Petitioners cite *Roy v. Bethlehem Steel*, 838 F. Supp. 312 (E.D. Tex. 1993), and *Frias v. Atl. Richfield Co.*, 999 S.W.2d 97 (Tex.App. – Houston [14th Dist.] 1999, pet. denied) to argue their proposition that a "twilight zone" employee could elect to receive benefits under the TWCA rather than the LHWCA.

---

1. Petitioners state that "it appears from this Court's opinion in *Perini* that [Mr.] Anaya was working over "navigable waters" and that this would make him a maritime employee covered by the LHWCA under existing law." (Petitioners' Petition for Writ of Cert. at page 8).

Neither of these cases are applicable. Although both of these cases cite *Sun Ship* as their authority for concluding that a "twilight zone" may exist, neither case examines § 406.091(a)(2) of the TWCA which eliminates any potential overlapping of federal and state compensation schemes. Further, the court in *Roy* does not discuss whether the employee is covered under the LHWCA or the TWCA, they simply recognize the existence of a "twilight zone" citing the *Sun Ship* case. *Roy* 838 F. Supp. at 316. The primary issue before the *Roy* court was the types of remedies available outside of workers' compensation coverage, not the issue that is presented to the Court today.

Contrary to Petitioners' reasoning, the Fifth Circuit did not circumvent this Court's "twilight zone" jurisprudence. Rather, the Fifth Circuit made a finding that under the specific facts of the case, the injuries at issue were covered by the LHWCA. As a result of this coverage, Texas laws, specifically § 406.091(a)(2) of the TWCA, precludes coverage for Mr. Anaya's accidental death. Therefore, Petitioners received their exclusive remedy and are prohibited from seeking any further relief under the TWCA.

B. The Fifth Circuit correctly applied Texas Labor Code § 406.091 which precludes concurrent-overlapping workers' compensation coverage when a worker is covered by an analogous federal workers' compensation scheme.

Petitioners argue that the Fifth Circuit misapplied § 406.091(a)(2) of the Texas Labor Code. Specifically, Petitioners represent that the Fifth Circuit erred in its opinion because *Davis* allowed concurrent-overlapping coverage when a "similar" Washington statute existed. Petitioners point

out that this Court in *Davis* allowed concurrent jurisdiction under Washington's statutory scheme; however, they are incorrect in their contention that the two state statutes are substantially similar, and they are mistaken in concluding the Fifth Circuit erred. The Fifth Circuit correctly applied Texas Labor Code § 406.091(a)(2), which precludes TWCA coverage to any injury which is covered by a federal workers' compensation scheme.

Davis is distinguishable because unlike the Washington state compensation laws, Texas workers' compensation law does not allow for concurrent jurisdiction because Texas specifically excludes state workers' compensation coverage for workers covered by a federal compensation scheme. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). Therefore, no "twilight zone" of concurrent jurisdiction, as described in *Davis*, could exist since Texas state law specifically excludes dual coverage.

The Supreme Court in *Davis* held that Washington's state compensation law could allow for coverage for workers under their state law who might also be covered under the LHWCA. *Davis*, 317 U.S. at 258. The Supreme Court did not conclude, as Petitioners are leading this Court to believe, that a state statute which purports to exclude workers' compensation coverage when there is analagous federal maritime coverage, does not preclude concurrent coverage. The Washington statute represented that state's effort to clarify the very muddied waters of the LHWCA's legislative history and case law. *Id.* at 255-56. Therefore, the Court upheld Washington's workers' compensation act affording coverage to "workmen . . . engaged in maritime occupation for whom no right exists under the maritime laws." *Id.* at 252.

While the *Davis* court found that the Washington State Workers' Compensation statute may provide concurrent coverage, § 406.091(a)(2) of the Texas Labor Code dictates that persons covered by a method of compensation established under federal law are not subject to Texas Workers' Compensation Insurance Coverage; therefore, eliminating any possibility for concurrent coverage under Texas law. While the Washington statute at issue in *Davis* specifically includes workers engaged in maritime employment, the Texas Labor Code specifically excludes application to any person covered by a federal compensation scheme like the LHWCA. Thus, Petitioners' contention that the two statutes are "functionally indistinguishable" is incorrect.

Petitioners further advance their arguments by proclaiming that provisions of the LHWCA support their contentions of concurrent jurisdiction. As the Court in *Davis* suggested, and as Petitioners point out, the LHWCA's exclusivity provision is not relevant in determining whether a worker falls within the "twilight zone" of concurrent coverage, rather it only comes into play once the injured worker is found to occupy one side of the jurisdictional line. *Id.* at 256. However, Petitioners argument that this Court's interpretation of the LHWCA's exclusivity provision proposes that no state may create a statute precluding coverage for those already covered under a competing workers' compensation scheme is inaccurate. Moreover, Petitioners' assumption that the Fifth Circuit used § 406.091(a)(2) "to decide which side of the state-federal 'divide'" Mr. Anaya sat, and thus removed him from the LHWCA "twilight zone" is wholly misplaced. The Fifth Circuit determined that the injuries at issue were compensable under the LHWCA because Mr. Anaya was injured while

working on navigable waters as part of his regular duties, which Petitioners acknowledge. Further, the LHWCA is a workers' compensation scheme created by the federal government. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994). Pursuant to § 406.091(a)(2), Mr. Anaya's injuries were covered by a federal compensation scheme and thus outside the scope of coverage the TWCA provides.

Additionally, the Fifth Circuit did not err by not conducting an analysis of § 406.091(a)(2). Petitioners surmise that if the Fifth Circuit did conduct an analysis of the legislative history and intent behind § 406.091(a)(2), then it would have concluded that the statute was only intended to prevent double recoveries and to ensure that competing compensation schemes do not encroach on one another. Such a statement is pure conjecture. The Fifth Circuit did not delve into the meaning behind § 406.091 because such an analysis is unnecessary. As stated previously, the language of § 406.091(a)(2) is clear and affords only one meaning–any injury compensable under an analagous federal workers' compensation scheme precludes coverage offered by the TWCA.

In reaching its opinion, the Fifth Circuit relied on the explicit language of the TWCA and *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999). *Anaya*, 478 F.3d at 255. The Court also looked to the Texas Workers' Compensation Commission's ("Commission") opinion interpreting § 406.091(a)(2) of the TWCA and the LHWCA and rejected Petitioners' argument that Mr. Anaya was in a "twilight zone" of concurrent jurisdiction. *Id.* at 255.

The Commission is the state agency that determines workers' compensation coverage. The Commission

previously heard the same argument from the Petitioners, in which they were requesting coverage under the TWCA, and after hearing the arguments and evidence presented by Petitioners' counsel the Commission concluded that they were not entitled to the rights and remedies under the TWCA. (CR336-42).

In rendering its decision, the Commission looked to the TWCA, Texas Labor Code § 406.091(a)(2), and § 903(a) of the Federal LHWCA which provides for compensation for death or disability if the death or disability resulted from an injury occurring on navigable waters of the United States. 33 U.S.C. § 901, § 903(a). The Commission reasoned that the decedent's regular job duties were performed and his death occurred on navigable waters. His presence upon such waters was not merely fortuitous or transitory, and it appeared that he was covered by a method of compensation established under federal law. (CR 339-42). Therefore, Petitioners had no standing to bring this suit claiming gross negligence against Traylor Bros. pursuant to the TWCA.

An analysis of § 406.091(a)(2) requires this Court to give great weight and deference to the agency charged with enforcing the statute. "It is well established that the consistent constructions of a statute 'by the agency charged with its enforcement is entitled to great deference by the courts.'" *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 751-52 (1977) [citations omitted]. Likewise, the Texas Supreme Court has stated:

> "It is an elementary rule that the contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the courts. Though not absolutely

> controlling, it is not to be disregarded without the most cogent and persuasive reasons."

Neubert v. Chi., R.I. & G. Ry., 116 Tex. 644, 651 (1927). *Accord*, *Ex parte Roloff*, 510 S.W.2d 913 (Tex. 1974). In agreeing with the Commission's holding that Mr. Anaya is not entitled to the rights and remedies under the TWCA, the Fifth Circuit correctly interpreted § 406.091(a)(2) of the TWCA.

Further, Petitioners cite *Nixson v. Mobil Oil Corp.*, 928 S.W.2d 245 (Tex. App. – Houston [14th Dist.] 1996, no pet.), as Texas case law confirming the nature of an exclusion such as § 406.091 of the TWCA. Petitioners argue that *Nixson* confirms that such an exclusion is to prevent double recovery, not to forbid an employee from electing between two competing schemes. Petitioners' reliance on *Nixson* is also misguided.

In *Nixson*, an injured railroad employee received benefits under the TWCA, then sued the employer for damages under the Texas Railroad Liability Act ("TRLA"). A summary judgment was granted for the employer because the injured employee failed to file an election as permitted under the TWCA to preserve a cause of action at common law or under a State statute which was allowed by TWCA § 406.034(b). *Id.* at 247.

The issue at hand is distinguishable because unlike *Nixson*, the Anayas do not have two competing schemes from which they may elect. The TWCA specifically excludes coverage if a person is covered by a method of compensation established under federal law. *See* § 406.091(a)(2). The Fifth Circuit, the District Court, and the Texas Workers'

Compensation Commission have all come to this conclusion. Furthermore, in the very case cited by the Petitioners, this specific section was discussed regarding how railroad workers were affected. The Court in *Nixson* stated that in the 1989 recodification of the TWCA, an exclusion for railroad workers disappeared; instead, the exemption was applied to those persons covered by a method of compensation established under federal law, citing the Texas Labor Code § 406.091. *Id.* at 250. The Court went on to state that the railroad employees that were not covered by the federal law were now implicitly covered by the TWCA. *Id.* at 250.

Conversely, an employee such as Mr. Anaya who is covered by a method of compensation established under federal law is specifically exempt from coverage under the TWCA. The Fifth Circuit correctly analyzed § 406.091(a)(2) of the TWCA and the LHWCA and came to the opinion that Mr. Anaya was not within the "twilight zone" of concurrent jurisdiction since he was a maritime employee covered under the LHWCA; therefore, he was not entitled to benefits under the TWCA.

Petitioners' next argue that the underlying purpose and policy of the TWCA justifies giving an injured employee his or her greatest route to recovery. Generally, the TWCA is liberally construed in an effort to allow the injured worker benefits for his work-related injuries; however, it is also presumed that a statute's intended result is just, reasonable, and feasible of execution. TEX. GOVT'T CODE ANN. § 311.021 (Vernon 2005). It is likely that if the Texas Supreme Court were faced with a similar question of law, it would hold that § 406.091(a)(2) precludes the TWCA's application to all of those covered under analagous federal compensation statutes.

See Tex. Mexican Ry. v. Bouchet, 963 S.W.2d 52, 59 (Tex. 1998) (J. Spector, dissenting) (concurring with the judgment on grounds that the Federal Employers' Liability Act ("FELA") is a method of compensation under federal law in which § 406.091(a)(2) exempts from the TWCA). Thus, by applying the plain language of the statute and construing previous decisions of various courts, the Fifth Circuit was correct in its opinion.

C. The Fifth Circuit's Opinion does not Unnecessarily Expand Exclusive Federal Jurisdiction into the State of Texas' Part of the Shared State-Federal "Twilight Zone."

Petitioners contend that the Fifth Circuit's opinion below expands exclusive federal jurisdiction to "occupy" an area previously shared by state and federal workers' compensation laws, thus negating and supplanting existing concurrent state jurisdiction in violation of principles of federalism. The principle of federalism holds "the role of states in a federal form of government is a vital component of the Constitution's overall scheme of separation of powers." *Texas v. United States*, 730 F.2d 339, 355 (5th Cir. 1984). In contrast to the Petitioners contention that the federal government supplanted state workers' compensation law, the Texas Legislature statutorily chose to give the federal government the obligation to fund certain workers' compensation incidents. The Texas Labor Code is a statute in which the Texas Legislature used their power as a sovereign state to determine who should fund workers' compensation. The Fifth Circuit merely applied the Texas statute to the facts in rendering its opinion. Therefore, the Fifth Circuit rendered its opinion on independent and adequate state law grounds that gives credence to Texas' legislative decisions.

Petitioners are correct in their assertion that workers' compensation laws traditionally operate in a local arena. "The power of states to make decisions and set policy is what gives the state its sovereign nature." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). The Texas legislature possesses the power to make decisions regarding workers' compensation, and through the Texas Labor Code, they chose to restrict the state's obligation to award benefits for certain injuries under the TWCA such as the one presently at issue. Further, Texas has an interest in applying its workers' compensation laws to employees who work, reside, or are injured in Texas. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 (1980). Accordingly, Texas would have an interest in legislating appropriate laws governing the disposition of workers' compensation awards in Texas. Such an interest is precisely why Texas created Labor Code § 406.091. As previously stated, § 406.091 precludes applicability of the TWCA to those injuries compensated by an analogous federal workers' compensation scheme. Thus, the Texas Legislature decisively limited the applicability of its own compensation laws to those injuries which are not covered by similar federal statutes.

Furthermore, Petitioners contend that Texas has expressed an interest in permitting workers to recover exemplary damages when their injuries are caused by the gross negligence of an employer. While Petitioners are correct that the Texas Labor Code allows suits based on gross negligence, Petitioners look past the plain language of § 406.091, which removes the instant case from the Texas Labor Code, placing exemplary damages out of reach. Petitioners cite *Carroll v. Lanza*, 349 U.S. 408 (1955) to support their proposition that "Texas' interest in having its policy choice honored on the availability of exemplary

damages in workers' compensation death cases is substantial." Texas' interest in permitting exemplary damages is no more substantial than its interest in limiting the scope of its workers' compensation laws, thus, the Texas Labor Code limiting the scope of workers' compensation should be honored. As the plain language of § 406.091 states, an injury compensable under a federal workers' compensation scheme, like the injury at issue in this case, is exempt from the TWCA, and thus TWCA coverage is not available in any form.

Petitioners' argument next focuses on this Court's decisions which scrutinize any extension of federal power into an area traditionally regulated by states. Petitioners focus on the plain language of the LHWCA and suggest that the Fifth Circuit's decision is somehow akin to federal legislation which intrudes on state regulation. "Unconstitutional coercion of the states [by the federal government] threatens state sovereignty because it strips states of choice and control over state policies." *Koog*, 79 F.3d at 457. In contrast to this assertion, the state of Texas is policing workers' compensation injuries–the federal government is in no way coercing the state to implement and follow any policies. To take from the states their power to implement policies such as the Texas Labor Code and allocate responsibilities to the federal government would be a true violation of the principle of federalism and would strip states' of their sovereignty endowed by the Constitution. To say the least, Petitioners' argument is wholly inadequate and attempts to twist the federalism argument. Petitioners argument, if successful, would circumvent Texas' legislative efforts to control its own laws concerning workers' compensation.

The Fifth Circuit did not "expand exclusive federal jurisdiction" of the LHWCA in its opinion below. Rather, the Fifth Circuit recognizes that Texas has a strong interest in: (1) regulating workers' compensation laws within its border; (2) limiting the potential liability of companies that transact business within its borders; and (3) the welfare of injured employees within its borders. As such, Texas has every right to limit the reach of workers' compensation coverage as it did in § 406.091. Therefore, the Fifth Circuit's opinion below does not expand the federal scope of "twilight zone" jurisdiction as Petitioners' contend, rather the Fifth Circuit applied the plain language of the Texas state statute.

CONCLUSION

For the foregoing reasons, Petitioners have failed to established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petitioners' Maria Genoeva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 06-1489

In The Supreme Court of the United States

MARIA GENOVEVA ANAYA, MARIO ANAYA, EDUARDO ANAYA, JESSICA ANAYA and AYDHEE ANAYA,

Petitioners,

v.

TRAYLOR BROS., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners file this reply to address certain issues raised in Traylor Brothers, Inc.'s Brief in Opposition to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Petitioners first address selected legal issues, and then factual issues.

A. Respondent Misconstrues Relevant Legal Standards

In attempting to distinguish *Davis v. Department of Labor*, 317 U.S. 249 (1942), from the present case, Respondent makes a false distinction between the Washington statute in *Davis* and Texas Labor Code Section 406.091. Respondent suggests that the statutes differ because the Washington statute includes "workers engaged in maritime employment," and the Texas statute excludes "any person covered by a federal compensation scheme like the LHWCA." Br. Opp. at 11. In fact, the relevant aspect of the Washington statute is not which workers it includes, but which workers it *excludes*. The statute excludes maritime workers "for whom no right or obligation exists under the maritime laws." *Davis*, 317 U.S. at 252. It is this latter clause which makes the Washington statute functionally indistinguishable from Section 406.091. *Compare Davis*, 317 U.S. at 252 (Washington statute excluded state coverage of maritime workers "for whom no right or obligation exists under the maritime laws.") and Tex. Labor Code § 406.091 (excluding coverage of "a person covered by a method of compensation established under federal law."). The only difference between the two statutes is semantic: one says that state law applies only if federal law does not, and the other says that state law does not apply if federal law does. Logically, these statements are identical: X only if not Y = If Y, then not X.

Respondent also argues that Texas law prohibits concurrent "twilight zone" coverage because Section 406.091 is designed to prevent receipt of dual benefits from both the federal and state schemes. Br. Opp. at 7 (§ 406.091 "does not allow for there to be overlapping-concurrent coverage between the TWCA and any federal workers' compensation scheme . . . . [T]he court correctly applied a state statute which precludes overlapping maritime workers' compensation."). Here, Respondent appears to confuse the concepts of concurrent *availability* of alternative systems, which neither federal nor Texas law precludes,[1] with the concurrent or dual *receipt* of benefits, which both statutes preclude. Respondent's argument is irrelevant because the twilight zone jurisprudence does not result in receipt of dual benefits; it results in an election between the two schemes. Like Texas statute § 406.091, the Washington statute at issue in *Davis* was designed to prevent double recovery.[2] This did not prevent the existence of a "twilight zone" in *Davis*; thus, rules designed to prevent double recovery of benefits from different systems are not a factor in the "twilight zone" analysis.

B. Respondent Incorrectly States Underlying Facts

Respondent repeatedly claims that the Texas Workers' Compensation Commission ("Commission") rejected the

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[1] *See* Pet. at 10-12.

[2] *See* Pet. at 13-14; *See Gorman v. Garlock, Inc.*, 118 P.3d 311, 317 (Wash. 2005) ("[T]he WIIA exempts from its coverage Washington workers covered by certain federal workers' compensation statutes, including the LHWCA. . . . The legislature's intent in excluding LHWCA-covered workers from the WIIA was to prevent double recovery by [such a] worker").

application of the "twilight zone" jurisprudence to this case. Br. Opp. at 5, 8, 12-13. This is incorrect. The Commission decision does not mention the "twilight zone" theory or any other federal case law. (CR 338-42). The "twilight zone" issue was not before the Commission.

Respondent claims that the Anayas sought and "elected" to "accept" benefits under the LHWCA. Br. Opp. at 2-3. Since the lower courts' decisions did not turn on whether the Petitioners applied for or accepted benefits under the LHWCA, this is irrelevant. However, to the extent that this issue may be deemed pertinent, Respondent's assertions are contrary to the record. Petitioners applied for benefits under the Texas Workers' Compensation Act ("TWCA") using Commission forms, and their application was accepted by the Commission.[3] Respondent's carrier responded pursuant to the TWCA.[4] The payments sent to Petitioners did not suggest that Respondent or its carrier contended the payments were made pursuant to the LHWCA.[5] In February 2005, more than three months after

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[3] *See* Petitioners Form 1 WCC-42, a Commission form. It instructs the applicant to "file this form with the Texas Workers' Compensation Commission." (CR 305-06). The Commission's receipt of Petitioners' application is reflected by a TWCC file number and by the "RECEIVED TWCC" stamp at the bottom of the first page. (*Id.*).

[4] Respondent's workers' compensation carrier, St. Paul Travelers, advised Petitioners of the amount of death benefits under the TWCA. (CR 308). It paid for Mr. Anaya's pre-death medical care according to "state fee schedule guidelines" and pursuant to the TWCA. (CR 310-13).

[5] The checks that Respondent's carrier sent to the Petitioners contained no notation or suggestion that they were being sent pursuant to the LHWCA (*see* Record Excerpts in Court of Appeals, Tab 8), and thus provided no notice to Petitioners that Respondents contended that they were cashing anything other than the TWCA benefits for which they had applied.

Respondent's carrier began to make payments, Respondent's carrier sent to the Commission a form titled "Payment of Compensation or Notice of Refused/Disputed Claim" in which Respondent's carrier claimed that "[b]enefits are being paid under the Longshore and Harbors Workers Compensation Act." (CR 314).[6] Petitioners have never accepted the contention of Respondent or its carrier that payments were due or properly made under the LHWCA. *See* Affidavit of Maria Genoveva Anaya (CR 302-03). Petitioners continued to accept payments because they were entitled to them under the TWCA.

Respondent also asserts that Petitioners "filed a request with the [Commission] requesting a termination of their LHWCA benefits in favor of benefits under the TWCA." Br. Opp. at 3. To the contrary, the evidentiary record shows that the Commission proceeding was initiated by Respondent when it filed its "Notice of Refused/Disputed Claim" form, contesting Petitioners' right to receive benefits under the TWCA. (CR 314).[7]

Also, Respondent's carrier was the same entity with respect to both TWCA and LHWCA coverage, so the identity of the payor provided no signal as to whether payments were sent under the TWCA or LHWCA. (CR 83, 150).

[6]Unless Petitioners were receiving benefits under the TWCA, there would have been no reason for Respondent to initiate a "dispute" challenging Petitioners' right to receive benefits under the TWCA.

[7]When Respondent filed its notice disputing Petitioners' right to receive benefits under the Act, this created a "benefit dispute," defined under the Texas Administrative Code as "[a] disputed issue arising under the Texas Workers' Compensation Act (the Act) in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits." 28 TEX. ADMIN. CODE § 140.1(1). The dispute between Respondent and Petitioner was resolved in a "benefit contested case hearing" (CR 339), a procedure authorized under Section 140.1(2).

CONCLUSION

Petitioners' Petition for Writ of Certiorari shows that the "twilight zone" jurisprudence established in *Davis* applies to the present case, rendering improper the district court's dismissal of the Petitioners' claims. Respondent's response provides neither a plausible distinction of *Davis* nor a basis for applying Texas Labor Code § 406.091 to preclude application of the "twilight zone."

For the foregoing reasons, and for the reasons set out in Petitioners' petition, a writ of certiorari should be granted.

Respectfully submitted,

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